No. 20114

In the United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellee,

vs.

2.45 ACRES OF LAND, more or less, in Yakima County, Washington, and GEORGE L. BOCK, et al,
Appellant.

No. 20114

BRIEF FOR APPELLANT

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BRIEF OF APPELLANT

JUDGMENT BELOW

The judgment below is based upon a verdict of a jury, the judgment and the verdict being found on page 104 of the transcript. The jurisdiction of the court is based upon the Act of Congress approved August 1, 1888, the Act of February 26, 1931, and the Act of August 27, 1958, authorizing the acquisition of land required for right of way in connection with the improvement of any section of the national system of interstate and defense highways (72 Stat. 893; 23 U. S. C. 107).

STATEMENT

This action was instituted by the United States of America to acquire a right of way for the construction of Interstate Highway 82 (Tr. 1). The property of appellant lies at the intersection of said Interstate Highway 82 and State Highway 11A. State Highway 11A runs generally in an easterly and westerly direction, while Interstate Highway 82 runs generally northerly and southerly connecting Ellensburg, Wash-

ington, with Pendleton, Oregon. State Highway 11A serves the Yakima Valley and the Columbia Basin with an eventual passage through Idaho, utilizing Lolo Pass (II R. 37 et seq.). The plan of construction called for the taking and limiting access from appellant's property to State Highway 11A, Interstate Highway 82 being a new highway, and *no access was provided from appellant's property directly to or from the frontage upon Interstate Highway 82, nor upon State Highway 11A*, (Ex. 2). Prior to the taking in question, appellant operated a vegetable garden and vegetable stand (II R. 181). Passersby from Yakima and Moxee and beyond utilized full access from State Highway 11A to appellant's property for commercial purposes. The take here, taking access from appellant's property to the state highway and denying appellant access to the interstate highway, destroyed the character of the property as commercial property and left a relatively small tract no longer suitable for vegetable stand or garden operations, leaving access jointly with Yakima's disposal plant (II R. 13). Under the laws of the state of Washington, R.C.W. 47.52.080, the owner of such property was entitled to damages taking into consideration the fact that said property was commercial property. The statute reads as follows:

> "No existing public highway, road or street shall be constructed as a limited access facility except upon the waiver, purchase, or condemnation of the abutting owner's right of access thereto as herein provided. In cases involving existing highways, if

> the abutting property is used for business at the time the notice is given as provided in RCW 47.-52.072, the owner of such property shall be entitled to compensation for the loss of adequate ingress to or egress from such property as business property in its existing condition at the time of the notice provided in RCW 47.52.072 as for the taking or damaging of property for public use."

The trial court declined to submit any instruction based upon that statute and declined to submit to the jury any issue of damages as a result of the loss of adequate ingress to and egress from such property as business property (I R. 84; II R. 196). The case was tried and submitted to a jury, the verdict being wholly inadequate from the standpoint of appellant.

SPECIFICATION OF ERRORS

1. The trial court failed to give appellant's proposed Instruction No. 6, which reads as follows (I R. 70):

> "I instruct you that while you may not consider U. S. Highway 82 as contributing to the value of this property you may, however, consider the contribution to value made by State Highway 11A, the Lenox Avenue Overpass and other developments aside from U. S. Highway 82 in arriving at your evaluation of the expert's testimony and in arriving at the award in this case."

While it is true that the improvement for which the property is taken cannot be considered as contributing to the value, other existing and imminent developments may be considered (II R. 215).

2. The trial court erred in failing to give appellant's

proposed instructions 4, 12, 13, and 14, which read as follows:

"Instruction No. 4

"You are instructed that by fair market value is meant the highest amount of money which in fair and unhurried negotiations, a well-informed purchaser, willing but not obliged to buy the property, would pay to a well-informed seller, willing but not obliged to sell it, taking into consideration all uses, including its highest and best use, to which the property is adapted and might in reason be applied. It means neither a panic price, speculative value nor a value fixed by depressed or inflated prices. Neither is it the value put on the property by the owner because of any value peculiar to him alone, nor because he may be unwilling to sell it, nor is it limited to what the property will bring at a forced sale." (I R. 68)

"Instruction No. 12

"I instruct you the fair market value of a property means not the low or the average, but the best price obtainable on the open market by a willing seller, not compelled, nor hurried, from a willing buyer, not compelled, nor hurried, to buy." (I R. 76)

"Instruction No. 13

"I instruct you that fair market value means the highest price obtainable on the free and open market within a reasonable time. It does not mean the price obtained at the fastest sale or the quickest sale; it can include what might be bought on contract or terms." (I R. 77)

"Instruction No. 14

"I instruct you that fair cash market value means the highest price that a willing and informed buyer not compelled to buy would pay to a willing and informed seller not compelled to sell, each being fully informed as to its past uses, its present condition, and its potential future uses. It means the best price

obtainable on the *open market*, not the average and certainly not the lowest, by a seller, well-informed, not compelled to sell, from a buyer also well-informed, not compelled to buy." (I R. 78)

The trial court failed to give these proposed instructions which raised the issue that the property owner in obtaining the fair market value is entitled to the highest price obtainable on the open market (II R. 215).

3. The trial court erred in failing to submit appellant's proposed Instruction No. 20, which reads as follows (I R. 84):

"Instruction No. 20

"I instruct you, ladies and gentlemen of the jury, that the Legislature of the State of Washington has enacted a law for the purpose of protecting an abutter's right of access and providing for compensation for the taking thereof. This statute reads in part as follows:

" 'No existing public highway * * * shall be constructed as a limited access facility except upon the * * * condemnation of the abutting owner's right of access thereto * * *. In cases involving existing highways, if the abutting property is used for business at the time the notice is given as provided in RCW 47.52.072 [which in this case was on or shortly after June 30, 1962] the owner of such property shall be entitled to compensation for the loss of adequate ingress to or egress from such property as business property * * *'."

Under the laws of the State of Washington, R.C.W. 47.52.080, the owner is entitled to damages taking into consideration the fact that said property was commercial property when he is deprived of direct access upon an existing highway. This statute reads as follows:

> "No existing public highway, road or street shall be constructed as a limited access facility except upon the waiver, purchase, or condemnation of the abutting owner's right of access thereto as herein provided. In cases involving existing highways, if the abutting property is used for business at the time the notice is given as provided in RCW 47.52.072, the owner of such property shall be entitled to compensation for the loss of adequate ingress to or egress from such property as business property in its existing condition at the time of the notice provided in RCW 47.52.072 as for the taking or damaging of property for public use."

Thus, in the State of Washington in cases involving existing highways, if the abutting property is used for business, the owner is entitled to compensation for loss of adequate ingress to or egress from such property as business property. This was a vested property right in the appellant for which he was entitled to compensation. Failure to give this instruction has the effect of taking such vested property right without compensation (II R. 216).

4. The court erred in denying the appellant's motion for new trial (I R. 110) for the reasons above stated.

5. The court erred in entering judgment upon the verdict (I R. 104) for the reasons above stated.

SUMMARY OF ARGUMENT

The court failed to give appellant's proposed instructions raising the issue that the appellant was entitled to have submitted to the jury the question of a contribution to value of the subject property taken in these proceedings made by State Highway 11A and other

improvements thereto, except U. S. Highway 82, the project for which this condemnation proceeding was deemed necessary. These condemnation proceedings would not be justified, nor would this court have jurisdiction in connection with any taking pertaining to State Highway 11A. Jurisdiction here is afforded only by reason of the take insofar as it pertained to United States Highway 82 (I R. 6; II R. 10). Consequently, the construction of the bridge on the Columbia River resulted in building up of traffic and potential commercial demand for such property, the construction of the Lenox Overpass across the heavily traveled South First Street; likewise building up traffic along such property and creating greater demand for same as commercial property were items of moment, and issues raised by such fact should have been submitted to the jury in accordance with appellant's proposed instruction No. 6 which the trial court declined to give (I R.70). The trial court failed to give appellant's proposed instructions which raised the issue that the property owner was entitled to the highest price obtainable on the open market for the property taken. The generally accepted measure of damage is the fair market value. Fair market value is defined to be the price that a willing seller not compelled to sell would require from a willing buyer not compelled to buy. The definition also contemplates a well informed seller. It is obvious that a well informed seller would take nothing but the highest price

obtainable on the open market. The tendency of condemnation actions is for a jury to compromise or average the values reflected by the various comparable sales. This should not be done. To avoid such averaging or compromising, instructions such as appellant's proposed instructions 4, 12, 13 and 14 should have been given (I R. 68 et seq.).

The trial court failed to submit to the jury the issue whether or not the property owner was entitled to compensation for loss of adequate ingress to or egress from such property as business property. R.C.W. 47.52.080 provides that, in cases involving existing highways, if the abutting property is used for business, the owner is entitled to compensate for loss of adequate ingress to or egress from such property as business property. This was a vested property right owned by the appellant. As the court failed to submit this question to the jury by refusing to give appellant's proposed instruction No. 20 appellant was deprived of property rights without compensation in violation of the state law, the State Constitution, and the Constitution of the United States of America (I R. 84).

APPELLANT'S ARGUMENT

I

Appellant's proposed instruction No. 6 reads as follows (I R. 70):

> "I instruct you that while you may not consider U. S. Highway 82 as contributing to the value of this property you may, however, consider the con-

> tribution to value made by State Highway 11A, the Lenox Avenue Overpass and other developments aside from U. S. Highway 82 in arriving at your evaluation of the expert's testimony and in arriving at the award in this case."

State Highway 11A intersects United States Highway 82. At that intersection is located appellant's property, and a portion of appellant's property was taken in connection with the approaches to said Interstate Highway 82 and the construction of Interstate Highway 82 itself. In addition to the approaches and the actual take for construction purposes, the entire access between appellant's property and State Highway 11A was taken as is shown by the maps and the record (Ex. 2). A substitute access was given appellant, not onto State Highway 11A, but on the approach road to Interstate Highway 82. *His entire direct access to State Highway 11A was destroyed and taken by these proceedings* (Ex. 2). Prior to the take, appellant operated a vegetable stand on his premises, and also a vegetable garden for the purpose of supplying the vegetable stand. The general public had direct access from 11A at all points to appellant's property and he conducted a substantial business upon said premises and made his livelihood thereon. After the take the business character of the property was destroyed and appellant no longer was able to maintain his business (II R. 181 et seq.). The business character of the property had great potential. The state Highway 11A served Yakima as its western terminus traveling east through Moxee, across

the Columbia River to the Columbia Basin, connecting with Lolo Pass in Idaho. State Highway 11A served the northern reaches of the Hanford area. Great numbers of workers working at Hanford living in Yakima traverse State Highway 11A daily (II R. 36 et seq.). State Highway 11A also served Sportsman's Park and the Moxee industrial area where several factories had located. Appellant's property therefore had great commercial potential which was entirely destroyed by the take in question. The trial court should have submitted to the jury the above proposed instruction No. 6 which submitted these issues to the jury. Authority for the submission of such issues is found in *Winn v. U.S.*, 272 F. (2d) 282, and *Seattle & Montana Railroad Company v. Roeder*, 30 Wash. 244, 111 Pac. 206. In the first of these cases the court said:

> "Lastly, appellants phrase their claim in terms of 'loss of access,' citing Hughes v. State, 80 Idaho 286, 328 P. (2d) 397; State ex rel. Rich v. Dunlick, Inc., 77 Idaho 45, 286 P. 2d 1112. An examination of these cases shows that in each an existing access to an existing road was damaged or destroyed by the new construction. Such is not the case in the instant action. The appellants will have the same access to Highway 30 after the Interstate is constructed as they had before.
>
> "The government does not contend that destruction of existing access is not compensable, Cravens v. United States, D.C.W.D. Ark. 1958, 163 F. Supp. 309: Schiefelbein v. United States, 8 Cir., 1942, 124 F. 2d. 945; but submits that none of appelants' access rights have been destroyed."

and in the second of these cases the court said:

"This land has a special value as stone-producing land. The owners, therefore, are entitled to compensation according to its value as such. *Sanitary District v. Loughran, supra.* It is like lands with buildings thereon, or timber land, or lands having any other commodity which is a part of the land itself. * * * If the extent and quality and value of the stone as it lies on the land may not be considered, there would be no way by which the value of the land with the stone could be shown. All legitimate evidence tending to establish the value of the land with the mineral in it is permissible."

Cf. *U.S. v. First National Bank*, 250 F. 299.

Two Washington cases including one which went to the Supreme Court of the United States bear upon this question. In *Ham, et al, v. Northern Pacific Railway Company*, 181 P. 898, 107 Wash. 378, it is said on P. 386 and again on P. 389:

"So it is proper to show that property possesses a peculiar value for railroad purposes, for dock purposes, for a mill site, for a ferry, for market gardening, for raising cranberries, for warehouse purposes, or for a bridge site."

"The case was analyzed and it was pointed out that the owner of the land there involved, which abutted on the river and shore, had no proprietary right in any boom site, and hence was not entitled to have its value for a boom site considered in estimating the value of the land. That the court does not intend, by its decision, to hold that the owner of land which was available for the purpose for which it was sought to be condemned was not entitled to have its value for that purpose considered as an element to establish the market value, is made clear by a later decision wherein an instruction to the jury was sustained to the effect that the jury, in making up their verdict, should take into consideration the value of the land as a boom site, although it was being condemned to be used for that purpose; citing

> *Columbia & Cowlitz River Boom & Rafting Co. v. Hutchinson*, 56 Wash. 323, 105 Pac. 636. The distinction between the cases as here made was pointed out by the editor in the foregoing note. It is true that the owner is not permitted to take advantage of the necessities of the condemning party, but neither can the condemner obtain something of value for nothing."

In *Chelan Electric Company v. Perry*, 268 P. 1040, 148 Wash. 353, 49 S. Ct. 478, 279 U.S. 823, 73 L. Ed. 977, the Court said, P. 358:

> "While the owner is forced to sell, he is not to receive by reason of that fact a lesser amount than the property would fairly bring upon the market. Likewise the condemnor, although perhaps forced to buy because of the peculiar location of the property with reference to its needs, is not required to pay more because of that fact. The necessities of neither must be permitted to affect the value to be received or paid. *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; *Ham, Yearsley & Ryrie v. Northern Pac. R. Co.*, 107 Wash. 378, 181 Pac. 898."

The law then becomes clear that the owner is not entitled to an enhancement of value by virtue of the project which makes necessary of the acquisition, but all other uses and relevant factors may be considered by the jury. Thus it was error not to submit instruction No. 6 proposed by appellant.

II

FAIR MARKET VALUE

While the trial court submitted the general proposition that the appellant was entitled to recover the fair market value of the property taken, together with a

separate damage to the remainder of the property, the court should have submitted the question more specifically as proposed by appellant's proposed instructions 4, 12, 13, and 14, which read as follows:

"Instruction No. 4

"You are instructed that by fair market value is meant the highest amount of money which in fair and unhurried negotiations, a well-informed purchaser, willing but not obliged to buy the property, would pay to a well-informed seller, willing but not obliged to sell it, taking into consideration all uses, including its highest and best use, to which the property is adapted and might in reason be applied. It means neither a panic price, speculative value nor a value fixed by depressed or inflated prices. Neither is it the value put on the property by the owner because of any value peculiar to him alone, nor because he may be unwilling to sell it, nor is it limited to what the property will bring at a forced sale." (I R. 68)

"Instruction No. 12

"I instruct you the fair market value of a property means not the low or the average, but the best price obtainable on the open market by a willing seller, not compelled, nor hurried, from a willing buyer, not compelled, nor hurried, to buy." (I R. 76)

"Instruction No. 13

"I instruct you that fair market value means the highest price obtainable on the free and open market within a reasonable time. It does not mean the price obtained at the fastest sale or the quickest sale; it can include what might be bought on contract or terms." (I R. 77)

"Instruction No. 14

"I instruct you that fair cash market value means the highest price that a willing and informed buyer not compelled to buy would pay to a willing and in-

> formed seller not compelled to sell, each being fully informed as to its past uses, its present condition, and its potential future uses. It means the best price obtainable on the *open market*, not the average and certainly not the lowest, by a seller, well-informed, not compelled to sell, from a buyer also well-informed, not compelled to buy." (I R. 78)

Fair market value, of course, contemplates a well informed buyer and well informed seller. It envisages the price which such a seller will require when he is willing to sell, but not compelled to sell, to a buyer who is not compelled to buy but is also willing to buy. These concepts are basic, but it should be borne in mind that no well informed seller is going to part wtih his property, even though he is willing to sell, for any price other than the best price on the open market. The well informed buyer knows different, and if he is willing to buy he is willing to pay the price. Actually we have been unable to find any authority to the contrary. The authority in support of this is found in *Sacramento Southern Railway Co. v. Heilbron*, 104 Pac. 979, 156 Cal. 408. In 29 C.J.S., Sec. 137, page 574, it is said:

> "The market value of property injured or taken for public use is the *highest price* estimated in terms of money which it would bring if exposed for sale in the open market with a reasonable time allowed in which to find a purchaser."

In the *Sanitary District v. Baumbach*, 270 Ill. 128, 110 N.E. 331, it is stated:

> "Highest fair cash market value of their land for the best use to which it was adapted."

In *Little Rock Junction Railway v. Woodruff*, 49 Ark. 381, 5 S.W. 792; 1 Orgel 90:

> "It is the highest price which those having the ability * * * are willing to pay."

To the same effect *Viliborgli v. School District*, 55 Ariz. 230, 100 P. (2d) 178. In *People v. Riciardi*, 23 Cal. (2d) 390, 144 P. (2d) 799, it is stated:

> "The highest price estimated in terms of money which the land would bring if exposed for sale on the open market with reasonable time allowed in which to find a purchaser buying with full knowledge of all of its uses and purposes for which it was capable."

And in 1 Orgel, page 95:

> "Best possible price."

As a matter of fact, the very concept of a seller being one not compelled to sell, but being willing but also being completely informed, stipulating these conditions which are well recognized in the law of valuation, the price could never be less than the best since the seller under such circumstances would never take less than that. The instructions proposed set forth above should have been given.

III

OWNER'S EXISTING ACCESS RIGHTS

As stated above, the northerly boundary of appellant's property prior to the take here involved abutted State Highway 11A (Exs. 1 & 2). This highway is one of the most heavily traveled highways through Yakima with prospects for dramatic increases in traffic count due to the expansion at Hanford, the development of the Columbia Basin, the construction of a new bridge

across the Columbia River, and the extension of the highway across the railroad tracks thereby serving the population in the west side of the city (II R. 36 et seq.; 77; 84 et seq.; 183). The appellant had used the property for commercial purposes, namely a successful vegetable and fruit stand operation (II R. 181). The public had access to the stand from every point along the highway along the northerly boundary of appellant's property before the take (Exs. 1 & 2). To assist the state in establishing Highway 11A as limited access the entire access as it formerly existed was condemned and taken away from the appellant and from the public which was served by the appellant's fruit stand (II R. 10). Instead the appellant was given the access described in the maps, namely to an approach road approaching Interstate Highway No. 82, thus effectively destroying the property as commercial property (Exs. 1 & 2).

The court failed to give appellant's proposed instruction No. 20, which reads as follows:

> "I instruct you, ladies and gentlemen of the jury, that the Legislature of the State of Washington has enacted a law for the purpose of protecting an abutter's right of access and providing for compensation for the taking thereof. This statute reads in part as follows:
>
> " 'No existing public highway * * * shall be constructed as a limited access facility except upon the * * * condemnation of the abutting owner's right of access thereto * * *. In cases involving existing highways, if the abutting property is used for business at the time the notice is given as provided in RCW

> 47.52.072 [which in this case was on or shortly after June 30, 1962] the owner of such property shall be entitled to compensation for the loss of adequate ingress to or egress from such property as business * * *.'" (I R. 84)

The above instruction is based upon RCW 47.52.080, which reads as follows:

> "No existing public highway, road or street shall be constructed as a limited access facility except upon the waiver, purchase, or condemnation of the abutting owner's right of access thereto as herein provided. In cases involving existing highways, if the abutting property is used for business at the time the notice is given as provided in RCW 47.52.072, the owner of such property shall be entitled to compensation for the loss of adequate ingress to or egress from such property as business property in its existing condition at the time of the notice provided in RCW 47.52.072 as for the taking or damaging of property for public use."

It is obvious that this statute creates a real property right which is vested in the owners of the property. This right has been taken in this condemnation proceeding, and it is a right which he is clearly entitled to become compensated for. The failure to give this instruction in effect constitutes the taking of property rights without compensation in violation of both the statute and the state Constitution and the Federal Constitution. It also works a discrimination between appellant and his neighbors whose property was taken in State Court (II R. 15). There are two cases from this court, *Winn v. United States*, 272 F. (2d) 282, and *Lockwood v. Portland*, 988 Fed. 480, bearing on the issues here. In both of these cases it is submitted the

court recognizes that vested property rights cannot be taken, although in each of these cases the court applied the Federal rule on limitation of owner's access. Whether we view what happened here as a non-jurisdictional ultra vires take by the Federal government for non-Federal purposes, (a taking to make State Highway 11A limited access) or we view it as taking of vested property rights without compensation, in either case, the appellant is entitled to a new trial with these issues submitted.

Basically here we are dealing with the nature and extent of the real property interests of the appellant which are taken in these proceedings. These real property interests—which have been taken here—are the interests for which compensation is awarded. See *Duckett vs. U.S.*, 266 U.S. 149, 69 L. Ed. 216, 45 S. Ct. 38 where the Supreme Court stated that by eminent domain the government takes "all interests." The court states that the accurate view would seem to be that the exercise of the power of eminent domain "extinguishes all previous rights." See *Polsun Log and Coal v. U.S.*, 160 F. (2d) 712. Compare also *Phyllis v. U.S.*, 243 F. (2d) 1.

To the same effect see *Brownlow v. O'Donoghue Bros.* 276 Fed. 636; *Bartholomae v. U.S.*, 253 F. (2d) 713, 73 ALR (2d) 1293; *U.S. v. Grizzard*, 219 U. S. 180, 55 L. Ed. 165, 31 S. Ct. 162; *Donovan v. Penn Co.*, 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91. A case spe-

cifically in point holding that the state law is the measure of the rights and interests taken for which compensation must be paid is *Schiefelbein v. U.S.*, 124 F. (2d) 945 where the 8th Circuit stated, page 947:

> "The theory presented in these and other Iowa cases is that an owner of land has a private property right in a public highway if the only access to his land is over that highway. The vacation of the highway is a taking of his property for which he is entitled to compensation. The property taken and for which compensation is payable is not the land to which access is cut off but the private property of the condemnee in the public highway. That that is also the reason underlying Union Electric Light Co. v. Snyder Estate Co. is clear from the only case cited by this court in support of its conclusion. That case is United States v. Welch, 217 U.S. 333, 30 S. Ct. 527, 54 L. Ed. 787, 28 L.R.A., N.S., 385, 19 Ann. Cas. 680. The case dealt with a private right-of-way and it supports Union Electric Light Co. v. Snyder Estate Co. only upon the theory that the public road involved in the Union Electric Light Co. case included property of the nature of a private right-of-way. It was made clear in United States v. Welch that the property for which compensation is payable is that actually taken, i.e., the right-of-way, and not that served by the right-of-way, although, said the Supreme Court, 'the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached.' "

It is evident from the foregoing cases that when the United States undertakes a condemnation proceeding in a case such as this, it acquires the fee which is no less than all of the interest and rights possessed and vested in the condemnee, including as in this case, the access right at all points along 11A abutting upon appellant's property as measured and described and vest-

ed in the condemnee by the above cited statute, R.C.W. 47.52.080.

CONCLUSION

It is respectfully submitted that the appellant is entitled to a new trial with the issues properly framed by appropriate instructions.

Respectfully submitted,
KENNETH C. HAWKINS
Attorney for Appellant

APPENDIX

EXHIBITS

		Identified	Received
Exhibit No.	1	6	6
	2	11	18
	3	26	27
	4	30	31
	5	42	60
	6-A – 6-G	77	82
	7-A – 7-B	77	82
	2-A – 2-B	83	84
	8	108	110

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Kenneth C. Hawkins
Attorney for Appellant